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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-805

CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, a governmental agency, ERSA POSTON, in her official capacity as Chairman of the Civil Service Commission of the State of New York,

Appellants,

against

MARIE SNEAD,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT FOR APPELLANTS

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JURISDICTIONAL STATEMENT FOR APPELLANTS

Appellants appeal from a decision of the United States District Court for the Southern District of New York (statutory three-judge court), entered on July 22, 1975, declaring unconstitutional Section 72 of the New York Civil Service Law.

Opinions Below

The opinion of the single district judge granting the motion to convene a three-judge court, dated November 30, 1972, is reported at 351 F. Supp. 1360. The first opinion and final order of the three-judge court, dated March 12, 1973, is reported at 355 F. Supp. 764. The second opinion and final order of the three-judge court, dated November 18, 1974, is reported at 389 F.Supp. 935. The third decision of the three-judge court, dated July 22, 1975, is not reported and is reproduced herein as Appendix "A".

Jurisdiction

The decision of the three-judge court was entered on July 22, 1975. The notice of appeal was filed on August 8, 1975 and is reproduced herein as Appendix "B".

The jurisdiction of this Court to review the instant case is conferred by 28 U.S.C. § 1253.

Statutes Involved

The relevant statute, Section 72 of the New York Civil Service Law is reproduced herein as Appendix "C".

Questions Presented

1. Whether the case has become moot by virtue of appellee's satisfactory performance following reinstatement to her job.

2. Whether due process requires that civil service employees be afforded an adversary hearing before being placed on a temporary leave of absence.

Statement of the Case

Appellee is a case worker with the New York City Department of Social Services and a tenured civil service employee. On May 10, 1972 she was placed on leave of absence for a period of up to one year based upon a psychiatric finding that she was mentally incapable of performing the duties of her position. This action was purportedly taken pursuant to Section 72 of the New York Civil Service Law. In fact, although Section 72 requires that the examination be conducted by a neutral medical officer, appellee was examined by a medical officer of her employer. On August 28, 1972, she appealed this determination to the New York City Civil Service Commission but did not pursue her appeal.

On October 25, 1972 appellee commenced the instant action claiming that her rights to due process and equal protection were violated because she was not given an adversary hearing prior to being placed on leave of absence. She denied that she was mentally disabled and alleged that her First Amendment rights were violated because her leave of absence was racially motivated and also reflected the fact that she had criticized the operation of Department of Social Service programs. She also claimed that the New York City Department of Social Services failed to comply with the terms of the statute. In addition to temporary injunctive relief, appellee moved for the convening of a three-judge court to declare Section 72 unconstitutional on its face. She also moved for an order declaring that the procedures used by the defendants in applying the statute to her "contravened the statute as written".

By decision dated November 30, 1972 the single district judge concluded that the question of whether due process required notice of charges and a hearing prior to the leave of absence authorized by Section 72 was a substantial one

requiring the convening of a three-judge court. In so holding, the court determined that the "nature of [appellee's] employment" was an " 'important interest' " comparable to interests which this Court has protected in recent decisions. 351 F. Supp. at 1365. However, the "nature of [appellee's] employment" was not defined by the court which, instead, apparently relied upon appellee's loss of income and general allegations that the Section 72 leave of absence foreclosed other employment and carried a stigma.* The question of what procedure would satisfy due process was referred to the three-judge court. 351 F. Supp. at 1366.

On March 13, 1973 the three-judge court declared Section 72 unconstitutional and enjoined appellants from taking any action thereunder. The court rejected appellants' contention that exhaustion of state administrative remedies was required where, as here, the administrative appeal goes to the question of whether the employee's claim before such court was ripe. Relying upon *King* v. *Smith,* 392 U.S. 309, the court determined that such exhaustion is unnecessary where the constitutional question raised by a civil rights plaintiff is so substantial as to require the convening of a three-judge court. 355 F. Supp. at 768.

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* The district judge took a different view of appellee's allegations of injury in denying her motion for a temporary restraining order. The court pointed out that appellee would suffer no permanent economic loss if she ultimately prevailed.

> "As to what she terms a 'badge of inferiority and incompetency,' the finding of the examining doctor is not a matter of public record, and that her leave of absence carries with it a stigma in this day is arguable". 351 F. Supp. at 1366.

The court weighed these allegations against the City defendants' "claim of disruptive conduct [by appellee] over an extended period, and the expressed concern for the safety of staff members" and concluded that to issue a temporary restraining order

> "would create a difficult and tense situation. It would result in potential interference with the normal functioning of a public office". 351 F. Supp. at 1367.

The court then rejected appellants' argument that abstention was appropriate. The court acknowledged that New York courts have read hearing provisions into statutes for the purpose of upholding their constitutionality, particularly in cases involving the mentally ill. However, it concluded that the legislative history of Section 72 barred this interpretation as well as an interpretation which would permit the employee to controvert the psychiatrist's report without holding a full hearing. The court also determined that nothing in the legislative history would allow the state courts to limit the Section 72 procedure to "emergency" situations.

On the merits the court held that appellee had been deprived of both liberty and property under the Due Process Clause. Her property right was based on the fact that as a permanent civil service employee "she has a right to continued employment in the absence of just cause". 355 F. Supp. at 771. Her right to liberty was violated because "a finding of mental illness severely diminishes a person's 'freedom to take advantage of other employment opportunities' ". *Id.*

The court held that the procedures afforded by Section 72 do not satisfy due process requirements because there is no provision for an adversary hearing before the employee is placed on leave. In its view, a prior hearing must be held so long as "there is no overwhelming necessity requiring immediate action". *Id.*

The neutral medical examination mandated by the statute as a prerequisite to placing the employee on leave of abence was held to be constitutionally inadequate because it does not "assure that a finding of mental unfitness will be a fair and accurate one". 355 F. Supp. 772. The court assumed that the conclusions of the doctor and the appointing authority as to mental fitness are "predicated in part upon their judgments concerning the truth or falsity of the charges which prompted the examination". *Id.*

Section 72 was, therefore, declared to be unconstitutional. "In light of this . . . disposition of the attack against Section 72 on its face" the Court did not consider appellee's First Amendment claim. 355 F. Supp. 767, n. 5. Nor did it consider the claim that appellee's employer had failed to comply with the terms of the statute despite the fact that counsel for the City defendants never denied that this was indeed the case.

Based upon its finding that the statute was unconstitutional the Court enjoined appellants from utilizing its provisions. The Court also ordered that appellee be reinstated with back pay for the relevant period.

On March 29, 1973, the Court granted appellants' motion for a stay of its order pending disposition of an appeal to this Court. The stay excepted from its operation the stipulation between appellee and the City defendants agreeing to reinstate appellee pursuant to the Court's order.

On May 13, 1974, this Court vacated the judgment of the three-judge court and remanded the case for further consideration in light of *Arnett* v. *Kennedy,* 416 U.S. 134. On November 18, 1974, the three-judge court again held Section 72 unconstitutional on its face. After contrasting the procedures available in *Arnett* with the Section 72 procedure, the Court adhered to its original determination that " 'defendants must conduct an adversarial hearing before placing civil service employees in permanent status on involuntary leave of absence for mental unfitness in the absence of exceptional circumstances requiring immediate action' ". 389 F. Supp. at 936-937.

The court acknowledged that by virtue of its ruling appellee was being accorded greater protection than the employee in *Arnett,* but distinguished the two cases by differentiating between the impact on reputation and employability involved in each case. According to the Court, a

finding of mental illness results in greater "potential lasting harm" than does a charge that the employee recklessly made public accusations that his employer was guilty of offering bribes to public officials. 389 F. Supp. at 937. In addition, although there is no support in the record or the statute, the Court assumed that a finding of mental illness—"even a preliminary finding"—would remain in the employee's file and be available to potential employers even if the employee is vindicated upon appeal. In view of these differences the Court concluded that "due process requires the observance here of more adequate safeguards against an incorrect initial determination". 389 F. Supp. at 937.

Following the Court's decision, appellants moved to amend the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure and Rule 9(m) of the Rules of the District Court of the Southern District of New York on the ground that the action was moot and academic. In support of the motion appellants urged that the action had become moot because appellee, who had been reinstated to her position by court order, was now described as an excellent employee. Appellants submitted an affidavit to this effect prepared by appellee's employer. The affidavit also stated that there was no longer any need to apply the provisions of Section 72 to appellee. Since the City defendants had never denied that they did not comply with the statute, appellants maintained that the issue of back pay could be determined without reference to the constitutionality of the statute.

In any event, appellants contended that the Court should not have determined the constitutionality of the statute on its face since appellee's employer had not complied with the terms of the statute and, therefore, the statutory procedure which is the subject of the cause of action was never actually initiated. Appellants' motion was denied without opinion on January 7, 1975.

On February 13, 1975, appellants' motion for a stay of the Court's order pending appeal to this Court was denied. At the same time the Court denied without opinion a motion by appellee to have the action certified as a class action.

Appellant's application to this Court for a stay pending appeal was denied on April 7, 1975 by Justice Blackmun. On May 27, 1975 this Court vacated the judgment of the three-judge court and remanded the case "for consideration of the question of mootness".

On July 22, 1975, the three-judge court held that the case was not moot although appellee has been reinstated to her former position. The Court relied upon the fact that the City defendants have continued to withhold appellee's back pay "pursuant to a statute that this court has held unconstitutional". The Court therefore concluded that appellee was entitled to entry of a judgment "declaring the statute unconstitutional and providing for back pay".

On August 8, 1975, when it became evident that no judgment would be entered within thirty days of the Court's decision, the State appellants filed a notice of appeal in order to be sure of protecting their right to appeal, particularly since no separate judgment had been entered by the three-judge court at the time of its two earlier decisions in this matter. Plaintiff thereafter submitted a proposed judgment for settlement. At that time, the City defendants, for the first time, disputed the power of the Court to award appellee any back pay. In order to allow for resolution of this point before appealing to this Court, the State defendants applied for an extension of time in which to docket their appeal. On October 6, 1975, Mr. Justice Marshall extended the State's time to and including December 6, 1975.

On November 5, 1975, the three-judge court was reconvened and heard argument with respect to the City's

liability. To date, there has been no decision and, consequently, no judgment. The instant brief is being filed by the State defendants in order to comply with the order of Mr. Justice Marshall.

ARGUMENT

This appeal presents substantial questions of law requiring reversal by this Court of the decision below.

1. The three-judge court erroneously reached out to decide the constitutionality of Section 72 of the New York Civil Service Law when the case had become moot.

Appellee was reinstated to her position as a social worker with the New York City Department of Social Services pursuant to the original decision of the three-judge court, dated March 13, 1973. She has continued to perform in that position to date. According to an affidavit submitted by her employer to the court below, her performance has been excellent and there is no longer any reason to apply the procedures of Section 72 of the New York Civil Service Law to her. There is, therefore, no longer any live grievance between her and appellants and the decision below should be reversed on the ground that the action is moot as against them. *Golden* v. *Zwickler*, 394 U.S. 103 (1969); *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974).*

The three-judge court held that the case was not moot only because an issue remains as to appellee's entitlement to back-pay. In the Court's view back pay is being withheld by the City defendants "pursuant" to a statute which it held unconstitutional in its previous opinions. The Court's reasoning is a good example of the tail wagging the dog.

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* *DeFunis* is particularly relevant since there, as here, the case ultimately became moot because of a court order giving the plaintiff personal equitable relief at an early stage of the litigation.

Contrary to the decision below, the question of appellee's entitlement to back pay does not arise from any constitutional defects in the procedure but, in the first instance, from the failure to implement those procedures. Section 72 requires that the examination of an employee for possible mental disability be conducted by a neutral medical officer "selected by the civil service commission or municipal commission having jurisdiction". The examination must not be conducted "under the aegis of the appointing authority . . ." *New York Legislative Annual—1969,* p. 64. Despite this statutory requirement, appellee was examined by a medical officer of her employer before being placed on leave of absence, and her complaint so alleges.* Moreover, the City defendants have never denied their failure to comply with the terms of the statute.

Because appellee's employer clearly failed to comply with the statute she attacks, its constitutionality was never actually put in issue. Her entitlement to relief is based solely on the procedure used in her particular case, not the statutory provisions which were not followed. Since the back-pay issue could have been resolved without deciding the constitutionality of the statute, the complaint should have been dismissed as against appellants. *Hagans* v. *Lavine,* 415 U.S. 528 (1974). Contrast *Powell* v. *McCormack,* 395 U.S. 486 (1969).

2. The question of whether due process requires that Civil Service employees be afforded an adversary hearing before being placed on a temporary leave of absence is a significant one for government employers which was erroneously resolved by the three-judge court.

In *Arnett* v. *Kennedy* this Court upheld the constitutionality of the federal procedure for discharging a tenured civil service employee although the procedure does not provide for a pretermination hearing. Before *Arnett,* the three-judge court in this case had gone one step further and held that a tenured employee must be afforded a full adversary hearing before he may be placed on an involuntary leave of absence for mental disability. On the remand in light of *Arnett,* the three-judge court, apparently feeling itself bound by the result in *Arnett* insofar as that case determined the property rights of tenured employees, nevertheless adhered to its original decision, but this time relying solely on appellee's alleged liberty interest. The result reached is still unprecedented. Indeed, the court below specifically acknowledged that its ruling affords more substantial protection of an individual's liberty interest than this Court has required in any of its decisions, including *Arnett.*

Assuming that the instant case presents a justiciable controversy, the court below erred because its decision is based upon an unwarranted expansion of the liberty interest of a public employee. The Court compounded its error by determining the form of the hearing and the time at which it must be held without reference to the crucial interest asserted by the State.

A. *The decision of the three-judge court is based upon an unwarranted extension of the decisions of this Court.*

In *Arnett* v. *Kennedy,* Mr. Justice Rehnquist, writing for the plurality, stated that an employee's interest in liberty under the Fourteenth Amendment "is not offended by dismissal from employment itself" although the dismissal is based upon a finding of cause. 416 U.S. at 157. On the contrary, the employee's liberty interest is offended only when his dismissal is "based upon an unsupported charge which could wrongfully injure [his] reputation" (*Id.*)—a charge such as "dishonesty, or immorality". *Board of Regents* v. *Roth,* 408 U.S. 564, 573 (1972).

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* Consistently with this allegation, the complaint prayed, *inter alia,* for an order declaring that the procedures used by the City defendants in applying the statute to appellee "contravened the statute as written".

In the instant case the three-judge court paid lip-service to *Roth* and *Arnett* and then ignored them by holding that a finding of mental illness results in a violation of the employee's liberty interest although the finding is not an "unsupported charge" but, by statute, must be made by a neutral medical examiner.

Thus, in its first opinion the three-judge court assumed that "a finding of mental illness severely diminishes a person's 'freedom to take advantage of other employment opportunities.'" The Court enlarged upon this assumption in its second opinion, stating,

> "the fact is that employment opportunities are reduced where an employer's files contain a finding—even a preliminary finding—of mental illness, which can be made available to any inquiring prospective employer" 389 F. Supp. at 937.*

Aside from the fact that there is no support in the record for either of these assumptions, they represent a departure from the *Roth* standard as reaffirmed in *Arnett*. The standard enunciated in *Roth* is not whether ability to earn a living has been diminished or "severely diminished" but whether it has been "foreclosed".

Moreover, in order to meet the *Roth* standard of serious harm to "standing and associations in the community" or "stigma . . . that forecloses . . . other employment opportunities" (408 U.S. at 573), it is evident that the employer must publish the allegedly damaging charge. The cases cited in *Roth* as illustrative of the circumstances

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* This assumption is to be contrasted with that of the single judge who, in convening the three-judge court, noted that "the finding of the examining doctor is not a matter of public record." The single judge also queried whether in today's society mental illness carries a stigma. *Snead* v. *Dept. of Social Services of the City of New York*, 351 F. Supp. 1360, 1366.

in which a stigma can properly be claimed support this view.

Wisconsin v. *Constantineau*, 400 U.S. 433, 435-436 (1971), applied due process protections to the public characterization of an individual as an inebriate. *Weiman* v. *Updegraff*, 344 U.S. 183, 190-191 (1952) invalidated a state loyalty oath under the Due Process Clause which classified individuals on the basis of associations with allegedly subversive or Communist front organizations. *Joint Anti-Fascist League* v. *McGrath*, 341 U.S. 23 (1951), invalidated as *ultra vires* the distribution of lists of certain allegedly communist organizations to all federal departments and agencies to be used to screen employees for disloyalty. *United States* v. *Lovett*, 328 U.S. 303, 316-317 (1946) invalidated a federal statute as a bill of attainder which effectively barred three individuals named in the statute from government service and which was enacted following a speech on floor of the House of Representatives wherein the named individuals were alleged to be members of "Communist front" organizations. *Peters* v. *Hobby*, 349 U.S. 331 (1955) reversed as *ultra vires* publicized administrative actions which barred a medical consultant from government services for three years. See *Birnbaum* v. *Trussell*, 371 F. 2d 672, 677-678 (2d Cir. 1966), holding that a physician dismissed on charges of racial bias and blacklisted at all municipal hospitals on the instructions of his former employer was entitled to due process protections because of serious damage to his reputation and ability to pursue his career.

The Section 72 procedure, which contemplates the employee's return to work and not his permanent discharge, by the same token, does not contemplate the type of publication inherent in the court's examples. Significantly, there has never been any allegation in the instant case that the finding of mental illness was in fact publicized by the

employer or likely to be publicized. Indeed, although appellee alleged in her complaint that during her leave of absence she was "unable to obtain any source of income" except from friends and relatives, she did not allege that she unsuccessfully sought other employment, let alone that she was prevented from obtaining other employment because of the finding of mental illness.

It is evident that the three-judge court acted purely on the basis of surmise in equating a medically determined finding of mental illness with charges such as disloyalty, dishonesty and immorality which heretofore have been recognized by this Court as constitutionally relevant. Certainly the possibility that in individual cases there may be a special effect on professional reputation is no reason to invalidate a statute of general application (*Lindsey* v. *Normet*, 405 U.S. 56 [1972], particularly where, as here, the statute does not provide for an outright discharge but merely a temporary leave of absence followed by the employee's return to his position.

Section 72 represents an enlightened attempt to deal with mental illness in the civil service by recognizing that although it occurs, it may be treated and overcome. Rather than terminate the services of a mentally ill employee on the grounds of incompetence and thereby cause a permanent blemish on his record, Section 72 is designed to encourage the employee to seek treatment and return to his job. The Legislature thus has determined that there is no stigma attached to mental illness. It is that determination which has been set aside by the decision below. In essence, it is the court below which has placed a stigma on mental illness. This Court should remove it.

B. *The three-judge court failed to recognize that it was bound by this Court's decision in Arnett* v. *Kennedy, 416 U.S. 134.*

According to the plurality opinion in *Arnett* v. *Kennedy*, and that of the two justices who specifically concurred therein in relevant part, when a charge has been made which affects an employee's liberty interest,

> "a hearing afforded by administrative appeal procedures *after* the actual dismissal is a sufficient compliance with the requirements of the Due Process Clause." 416 U.S. at 157 (Emphasis supplied.)

Despite this unequivocal ruling by a majority of this Court, the court below proceeded to carve out an exception where the alleged stigma is a finding of mental illness. Moreover, it did so by failing to take account of the fact that the Government interest which excused a prior hearing in *Arnett* is also at stake in the instant case.

The approach adopted by the three-judge court was that of comparing the impact on reputation and employability in a case like appellee's—albeit there was no evidence in the record of any impact—with the impact which might be caused by the charge involved in *Arnett*. In the Court's view, the initial Section 72 finding is likely "to produce more substantial harm" which would be "less easily eliminated by a subsequent vindication" than would be true in *Arnett*. 389 F. Supp. at 937.

Assuming *arguendo* that the speculation indulged in by the three-judge court is realistic, there are nevertheless two defects in its approach. The first is that absolutely nothing in *Arnett* suggests that stigmas be, in effect, rated for due process purposes. On the contrary, the majority's conclusion that a post-termination hearing is adequate is in no way limited to the alleged stigma in that case but has reference to all cases in which a liberty interest is involved.

In fact, the Court treated the charge against the employee in *Arnett* as being, in effect, an accusation of dishonesty, i.e., a type of charge previously recognized by this Court as constitutionally relevant. 416 U.S. at 156-157.

The second defect in the approach used by the three-judge Court is that it determines what procedures are due the employee solely from the viewpoint of the employee's interests. This is directly contrary to the decisions of this Court which state that

> "consideration of what procedures due process may require under any given set of circumstances *must begin with a determination of the precise nature of the government function involved* as well as of the private interest that has been affected by governmental action." (Emphasis supplied)

Cafeteria & Restaurant Workers v. *McElroy*, 367 U.S. 886, 895 (1961); *Goldberg* v. *Kelly*, 397 U.S. 254, 263 (1970). It was only by making *no* reference at all to the crucial interest asserted by the State that the court below decided not only that a Section 72 leave of absence must be preceded by a hearing but also that the hearing must be adversarial in nature.

Section 72 was enacted to resolve what the Legislature found to be "[o]ne of the most knotty personnel problems that plagues both State and Municipal agency heads"—the problem of the employee who is capable of reporting to work, but is mentally incapable of performing his duties while there.

> "The illness or disability in almost all cases of this kind is a mental or emotional disturbance or instability, sometimes accompanied by physical deterioration. Such an employee very often is a disruptive influence on the rest of the staff. His work has to be absorbed by others—frequently under very trying circumstances. In most cases he does not realize his incapacity and is suspicious and accusatorial, causing a constant state of tension." *New York Legislative Annual—1969*, p. 63.

The State's interest in the instant case is thus at least as substantial as that which excused a prior hearing in *Arnett*. Here, as in *Arnett*,

> ". . . the Government's interest, and hence the public's interest, is the maintenance of employee efficiency and discipline. Such factors are essential if the Government is to perform its responsibilities effectively and economically. To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency. Moreover, a requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted discharges. Thus, the Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial. 416 U.S. at 168.

On the other hand, the employee's interest in the instant case is no more substantial than that of the employee in *Arnett*. Indeed, it may be less substantial given the fact that Section 72 merely contemplates a leave of absence and not an outright discharge. In any event, because the three-judge court failed to weigh the relevant interests as required by *Arnett*, it erroneously distinguished this case from *Arnett* in holding that a prior hearing is necessary.

Contrast *Sanford* v. *Rockefeller*, 35 NY2d 547, 324 N.E.2d 113 (1974), appeal dismissed *sub nom. Sanford* v. *Carey*, 421 U.S. 973 (1975).*

C. *In the case of a temporary leave for mental disability due process is satisfied by a neutral medical examination followed by a comprehensive appeal.*

Due Process "does not require a trial-type hearing in every conceivable case of government impairment of private interest." *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U.S. 886, 894 (1961). As this Court recently emphasized:

> "'[t]he formality and procedural requisites for the hearing can vary, depending upon the interests involved and the nature of the subsequent proceedings.'" *Board of Regents* v. *Roth*, 408 U.S. 564, 570, n. 8.

In the instant case the State's interest is that of insuring that agencies which are required to perform a public function be staffed at all levels of responsibility with personnel competent to perform their assigned duties. The employee's interest is in avoiding an unwarranted leave of absence even though he is subject to reinstatement and reimbursement if the employer has erred. The procedure established by Section 72 satisfies due process standards because it is relevant to the State's problem and also protects the employee from arbitrary action by his employer "within the limits of practicability." *Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1971); *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306, 318 (1950). More is not required.

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* The dismissal in *Sanford* reaffirms appellants' view that due process does not require a prior hearing in the instant case, particularly since *Sanford*, like the instant case, was decided following this Court's remand for reconsideration in light of *Arnett* v. *Kennedy*.

Section 72 does not establish a summary procedure but requires that before the State may act with respect to an allegedly mentally disabled employee there must be a medical examination by a neutral medical officer.* The issue to be determined by the physician is not whether there were, in fact, grounds to request a psychiatric examination in the first place, but the limited medical issue of whether the employee is mentally able to perform his job. This is a medical evaluation of the employee's state of mind based upon a first-hand examination.

Pursuant to subdivision 3 of Section 72, the employee may appeal to the relevant Civil Service Commission from the determination placing him on leave and/or following a refusal to reinstate at which time the Civil Service Commission may "conduct such inquiry as it deems necessary or desirable" in reviewing the employee's case. This review is sufficiently broad and flexible to permit the employee to introduce any relevant evidence to rebut the finding of mental disability. This would not exclude any medical report or evidence produced by the employee upon his own initiative.

The review further requires that the Commission have the benefit of the opinion of another neutral medical officer. At a minimum, therefore, the Commission is likely to have before it *three* expert opinions upon which to make a determination that the initial finding was or was not arbitrary.

In addition, Article 78 of the New York Civil Practice Law and Rules affords judicial assurance that no employee will be treated erroneously under the provisions of Section 72. *Sanford* v. *Rockefeller*, 35 N Y 2d 547, 324

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* This procedure is to be contrasted with that approved in *Arnett* v. *Kennedy* which permitted the person who preferred the charges against the employee to be the decision-maker. Furthermore, in *Arnett*, "the hearing official was the object of slander that was the basis for the employee's proposed discharge." 416 U.S. at 199.

N.E. 2d 113 (1974), appeal dismissed *sub nom. Sanford* v. *Carey*, 421 U.S. 973 (1975). In such a proceeding the employee may submit anew any controverting papers bearing upon the disposition he challenges. He may include an allegation that the determination was based upon a mistake of underlying fact, including the grounds for referral to the psychiatrist, and litigate that question *de novo* in the state courts. *Matter of Thomasson* v. *Valentine*, 263 App. Div. 334, 336-37, 32 N.Y.S. 2d 996 (1st Dept. 1942). *Cf. Matter of Marks* v. *Schechter*, 12 A D 2d 74, 208 N.Y.S. 2d 570 (1st Dept. 1960), affd. 10 N Y 2d 759, 117 N.E. 2d 51 (1961).

The procedures available both before and after the employee is placed on leave are plainly sufficient to establish "the validity, or at least the probable validity, of the underlying claim" of mental disability (*Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 343 [1969]; *Fuentes* v. *Shevin*, 407 U.S. 67, 97 [1972]) and thereby protect the employee's interest in remaining on the job. At the same time they serve the government's critical interest in the proper and efficient functioning of its agencies. The imposition of additional procedural formalities would, as Mr. Justice Powell emphasized in *Arnett*, "impose additional administrative costs, create delay and deter warranted" leaves of absence (416 U.S. at 168)—a consequence which the court below neglected to consider and which this Court has sought to avoid. *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U.S. 886 (1961); *Goldberg* v. *Kelly*, 397 U.S. 254, 264 (1970).

CONCLUSION

This Court should note probable jurisdiction and summarily reverse the decision below or, in the alternative, should grant plenary consideration to the instant appeal.

Dated: New York, New York, December 4, 1975.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civil 4536

OPINION

MARIE SNEAD,

Plaintiff,

against

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, a governmental agency, JULES SUGARMAN, in his official capacity as Commissioner of the Department of Social Services of the City of New York, INES MONTEVERDE, in her official capacity as a Supervisor in the Department of Social Services of the City of New York, CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, a governmental agency, HARRY I. BRONSTEIN, in his official capacity as Chairman of the Civil Service Commission of the City of New York, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, a governmental agency, ERSA POSTON, in her official capacity as Chairman of the Civil Service Commission of the State of New York,

Defendants.

Before MULLIGAN, Circuit Judge, and WEINFELD and BRYAN, District Judges.

Appendix "A".

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Appendix "A".

PER CURIAM:

After the Supreme Court vacated the judgment entered pursuant to our initial opinion holding that section 72 of the New York Civil Service Law is unconstitutional,[1] and remanded the case for further consideration in light of *Arnett* v. *Kennedy*,[2] we reaffirmed our initial holding on November 18, 1974.[3] The Supreme Court has again vacated the judgment and remanded the case, this time for consideration of the question of mootness.[4]

The State's motion to amend the reaffirmed judgment specifically raised the question of mootness in the same posture in which it is now presented. After due consideration, the motion was denied.

After this Court's initial decision ordering plaintiff's reinstatement with back pay, the parties entered into a stipulation that provided, pending final disposition of the appeal by the Supreme Court, for plaintiff's reinstatement and a stay of the back pay award. Plaintiff has been reinstated to her former position and is receiving her current salary, but the City stubbornly refuses to give her back pay. Thus, back pay, which this Court has indicated from the outset is an essential element of full relief,[5] continues to be withheld pursuant to a statute that this court has held unconstitutional. Under the circumstances, the case is clearly not moot.[6]

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[1] 355 F. Supp. 764 (S.D.N.Y. 1973).

[2] 416 U.S. 134 (1974). The Supreme Court's initial remand is reported at 416 U.S. 977 (1974).

[3] 389 F. Supp. 935 (S.D.N.Y. 1974).

[4] 43 U.S.L.W. 3624 (U.S., May 27, 1975).

[5] 351 F. Supp. 1360, 1366 (S.D.N.Y. 1972); 365 F. Supp. 764, 773. *Cf.* Albemarle Paper Co. v. Moody, 43 U.S.L.W. 4880, 4883-86 (U.S., June 25, 1975).

[6] *See* Powell v. McCormack, 395 U.S. 486, 495-500 (1969).

Appendix "A".

Plaintiff is entitled to the entry of judgment declaring the statute unconstitutional and providing for back pay for the period of her involuntary leave of absence together with interest thereon. Judgment may be entered accordingly.

Dated: New York, N. Y., July 22, 1975.

WILLIAM H. MULLIGAN (per R.E.M.)
U.S.C.J.

EDWARD WEINFELD
U.S.D.J.

FREDERICK VAN PELT BRYAN
U.S.D.J.

APPENDIX "B"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NOTICE OF APPEAL
72 Civ. 4536

MARIE SNEAD,

Plaintiff,

against

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, a Governmental Agency, JULE SUGARMAN, in his official capacity as Commissioner of the Department of Social Services of the City of New York, INES MONTEVERDE, in her official capacity as Supervisor in the Department of Social Services of the City of New York, CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, a Governmental Agency, HARRY I. BRONSTEIN, in his official capacity as Chairman of the Civil Service Commission of the City of New York, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, a Governmental Agency, ERSA POSTON, in her official capacity as Chairman of the same,

Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the New York State Civil Service Commission and Chairman Ersa Poston, defendants in this action, hereby appeal to the Supreme Court of the United States from the decision granting a declaratory judgment and a permanent injunction entered in this action on July 22, 1975.

Appendix "B".

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: New York, New York, August 8, 1975.

Yours. etc.,

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APPENDIX "C"

§ 72. LEAVE FOR ORDINARY DISABILITY

1. When in the judgment of an appointing authority an employee is unable to perform the duties of his position by reason of a disability, other than a disability resulting from occupational injury or disease as defined in the workmen's compensation law, the appointing authority may require such employee to undergo a medical examination to be conducted by a medical officer selected by the civil service department or municipal commission having jurisdiction. If, upon such medical examination, such medical officer shall certify that such employee is not mentally fit to perform the duties of his position, the appointing authority may place such employee on leave of absence. An employee placed on leave of absence pursuant to this section shall be given a written statement of the reasons therefore. An employee on such leave of absence shall be entitled to draw all accumulated, unused sick leave, vacation, overtime and other time allowances standing to his credit.

2. An employee placed on leave pursuant to subdivision one of this section may, within one year after the date of commencement of such leave of absence, or thereafter at any time until his employment status is terminated, make application to the civil service department or municipal commission having jurisdiction over the position from which such employee is on leave, for a medical examination by a medical officer selected for that purpose by such department or commission. If, upon such medical examination, such medical officer shall certify that such employee is mentally fit to perform the duties of his position, he shall be reinstated to his position.

Appendix "C".

3. An employee who is certified as not mentally fit to perform the duties of his position and who is placed on leave of absence pursuant to subdivision one of this section, or who is denied reinstatement after examination pursuant to subdivision two of this section, may appeal from such determination to the state or municipal civil service commission having jurisdiction over his position. Such commission may conduct such inquiry as it deems necessary or desirable, and shall provide for a medical examination of such employee, which shall be conducted by a medical officer designated by the commission who shall not be the same medical officer who examined the appellant under subdivision one or two in connection with the determination under appeal. If the commission finds that the determination appealed from is arbitrary or unreasonable, it shall direct the reinstatement of such employee.

4. If an employee placed on leave pursuant to this section is not reinstated within one year after the date of commencement of such leave, his employment status may be terminated in accordance with the provisions of section seventy-three of this article.

Added L.1969, c. 225, § 2, eff. April 25, 1969.